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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 443.

RUFUS F. TURNER AND
MARGUERITE H. TURNER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR REHEARING

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PETITION FOR REHEARING

On November 28, 1962, the District Court's decision in *Charter Wire, Inc.* v. *U.S.*[1] was affirmed by the Court of Appeals for the Seventh Circuit[2] and is the basis for this Petition for Rehearing. The criteria adopted by the Dis-

[1] —F. Supp.— (DC Wis. Nov. 17, 1961) (8 AFTR2d 5993).

[2] —F2d — (C.A. 7, Nov. 28, 1962) (10 AFTR2d 6030).

trict Court and the Seventh Circuit in holding that an obligation created upon incorporation was the equivalent of stock (risk-capital-equity) results in a rationale and a decision diametrically in conflict with the Tax Court's arbitrary conclusion here (as affirmed by the Fourth Circuit) that the notice of indebtedness was not the equivalent of stock. We have been advised by counsel for *Charter Wire, Inc.*, that a petition for writ of certiorari will be filed. Accordingly, if certiorari is granted in this case and in *Charter Wire, Inc.*, we respectfully suggest that the two cases be heard together. Also, the Commissioner may seek certiorari in the recent case of *Nassau Lens Co.* v. *Comm.*[3]

Rule 19(1)(b) of the Supreme Court's Rules sets forth the primary bases for consideration of whether a writ of certiorari shall issue. Observing the precepts of this rule as it applies to the sole issue[4] here of whether the notice of indebtedness received by the petitioners upon incorporation was "debt" or "equity", it is evident:

(1) The Tax Court's decision here, as affirmed by the Fourth Circuit, is directly in conflict with the following additional Court of Appeal decisions:

(a) *P. M. Finance Corp.* v. *Comm.*, 302 F2d 786, (C.A. 3, May 10, 1962 (9 AFTR2d 1454)

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[3]—F2d — (C.A. 2, Sept. 17, 1962) (10 AFTR2d 5581) See commentary of Research Institute of America, Vol. 2, Recent Developments, Par. K-5108 for an excellent summary of this question and their reasons for anticipating Supreme Court review of this question.

[4] Rule 58(2) restricts the Petition to the ground above specified (Pet. Argument "A").

(b) *Brake & Electric Sales Corp.* v. *U.S.*, 287 F2d 426 (C.A. 1, 1961) (7 AFTR2d 921)

(c) *O. H. Kruse Grain & Milling Co.* v. *Comm.*, 279 F2d 123, 125-126 (C.A. 9, 1960) (5 AFTR2d 1544)

(2) By reason of the many incorporations that involve the creation of evidences of debt, the Court of Appeals for the Fourth Circuit has decided an important question of federal law which has not been but should be settled by this Court. For the Commissioner to here contend that the notice of indebtedness was debt constitutes a most appalling degree of hypocrisy.[5] Denial of certiorari here will give the Commissioner "carte blanche" to continue his conflicting determinations of what constitutes "debt" or "equity" upon incorporation.

(3) The Court of Appeals for the Fourth Circuit has sanctioned the Tax Court's determination that the obligation created upon incorporation was "debt" on the basis of the sole characteristic that the notice of indebtedness was a "note" in direct conflict with this Court's decision in *John Kelley Company & Talbot Mills* v. *Comm.*[6] which provides that "*** There is no one characteristic, *** which can be said to be decisive in the determination of whether the obligations are risk investments in the corporations or debts. ***".

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[5] In the cases referred to in paragraph (1) above, it was the Commissioner's contention that the debt ~~credited~~ created upon incorporation was the equivalent of stock.

[6] 326 U.S. 521, 66 S. Ct. 299, 304

(4) If failing to remand the Tax Courts decision for a better statement of the basis of its conclusion that the notice of indebtedness represented debt (and not equity) as suggested by the respondent! and for failing to so much as even acknowledge the existence of this extensively presented issue, the opinion of the Fourth Circuit "*** has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned a departure by a lower court, as to call for an exercise of this court's power of supervision".

The Tax Courts decision here (Pet. App. 24):

> "It is unnecessary to discuss petitioner's final contention that the notice of indebtedness represented an equity interest equivalent to stock, *in view of our holding that the notice of indebtedness is a note*" (emphasis supplied).

for all that appears, indicates that its determination was based on the single reason that it found the notice of indebtedness to be a "note". Even where the standard of law is not complex, as it certainly is here,[7] this Court has held that such an unelaborated finding of ultimate fact cannot stand as fulfilling the requirements of Rule 52, Federal Rules of Civil Procedure, 28 U.S. C.A., in that "It affords the reviewing court not the semblance of an indication of

[7] The Kruse case, supra, refers to ten separate criteria (or standards) in addition to the form of the debt to test whether "debt" or "equity" exists.

the legal standard with which the trier of fact has approached his task". *Stanton* v. *U.S. sub. nom. Comm.* v. *Duberstein*, 363 U.S. 278, 80 S.Ct. 1190. Moreover, it has been held that under the provisions of § 7459(b) of the Internal Revenue Code of 1954 (68 A Stat. 886) "*** the Tax Court is required to do more than pronounce a conclusion since it must lay bare for judicial review—as well as for the parties—the basis of its decision. *Wisconsin Memorial Park Co.* v. *Comm.*, 255 F.2d 751 (C.A. 7, 1958) (1 AFTR2d 1726)

CONCLUSION

If this Court believes that certiorari should not here be granted for the purpose of considering the merits of the single question of "whether the notice of indebtedness constitutes debt or equity," then it is respectfully urged that this Court remand this specific question to the Tax Court for further proceedings "to lay bare for judicial review—as well as for the parties—the basis of its decision on this question" or grant such other, further relief, as in the premises, it may deem fit and proper.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to the requirements of Rule 58 (2) of this Court, the undersigned counsel certify that this Petition for Rehearing is being made in good faith and not for any purposes of delay and that the Petition is restricted to the ground above specified.

Fortescue W. Hopkins
H. Clyde Pearson